



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
West Coast Region  
1201 NE Lloyd Boulevard, Suite 1100  
PORTLAND, OR 97232-1274

April 7, 2021

Michelle Walker  
Chief Regulatory Branch  
Seattle District, U.S. Army Corps of Engineers  
P.O. Box 3755  
Seattle, Washington 98124-3755

Re: Electron Dam – Immediate Resolution to Fish Passage Needed

Dear Ms. Walker:

This letter concerns actions taken in the fall of 2020 by the U.S. Army Corps of Engineers (USACE) and applicant, Electron Hydro LLC (Electron). In the fall of 2020, the USACE permitted and Electron constructed new permanent and temporary in-water structures in the Puyallup River. As a result, the current configuration of the Electron Dam (Dam) and the temporary structures that were placed in the river last fall give rise to multiple issues that are highly concerning for salmon and steelhead in the river. We are requesting your immediate assistance in resolving these issues.

First, the permanent and temporary structures are both significant impediments to upstream passage of adult fish. The current situation is creating attraction flows that would direct migrating fish away from the ladder to an impassable section of the dam. If impediments to adult passage are not addressed before June, 2020, the Dam and its temporary structures could strand and potentially kill hundreds of Endangered Species Act (ESA) listed Puget Sound (PS) Chinook salmon (*Oncorhynchus tshawytscha*), Puget Sound steelhead (*O. mykiss*), and block access to their designated critical habitat, preventing their migration to spawning grounds in the upper reaches of the Puyallup. The current predicted return of PS Chinook to the Puyallup River will make 2021 returns the highest on record since 2015. This predicted magnitude of this year's return heightens the urgency of resolving this situation.

Secondly, the interim structures placed in the river are likely to harm downstream-migrating juvenile Chinook and steelhead. Given the annual variability in the timing of downstream migration, this harm may already be occurring. The placement, in the fall of 2020, of the rock chute in the vicinity of the spillway poses a significant hazard. Juvenile fish are exposed to either striking against sharp surfaces or blunt structures, which results in injury or death.



NMFS urges the USACE and Electron to investigate options to immediately address these impacts to adult and juvenile migration. NMFS believes that opening the main river channel is one viable solution to address both adult and juvenile passage. Opening the main river channel would reduce the false attraction flow driving adults to an impassable section of the dam, and would reduce harm to migrating juveniles by providing less encumbered downstream passage. We recommend a meeting with the USACE and Electron as soon as possible so that the USACE and Electron can consider, select, and swiftly implement an option that results in unobstructed, safe, timely and effective fish passage. We will need to act quickly to put a solution in place in order to avoid potentially significant unauthorized take of ESA-listed salmonids.

#### Current Status and Perspectives on ESA Consultation

On September 11, 2020, after assessing Electron's deviations in implementing NOAA Fisheries' 2018 Biological Opinion (WCR-2016-4993), we recommended via email to the USACE that they consider re-initiating ESA consultation. At the time, we also understood that circumstances at the structure meant that urgent interim actions were needed to secure the site and that the resulting in-water work and temporary structures would not be provided to NOAA Fisheries to receive an ESA review prior to their installation. NOAA Fisheries recommended that fish passage remain a high priority as interim measures were explored and implemented.

NOAA-Fisheries believes that several triggers for reinitiating the 2018 Opinion have been met. As 50 CFR 402.16 states, re-initiation of consultation is required and shall be requested by the federal agency or by the Service where discretionary federal agency involvement or control over the action has been retained or is authorized by law and if:

*(1) The amount or extent of incidental taking specified in the Incidental Take Statement (ITS) is exceeded,*

To date there is no indication that the Terms and Conditions of the ITS have been met, making it difficult to ascertain the compliance with the ITS. Additionally, with the significant divergence from construction actions contemplated in the 2018 Opinion, the actual take that did occur and continues to occur now is not exempted in the WCR-2016-4993 ITS.

*(2) New information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this Opinion,*

Electron's deviations from the proposed action and subsequent construction actions have resulted in impacts that affect migration of PS Chinook and PS steelhead in a way that was not contemplated in WCR-2016-4993.

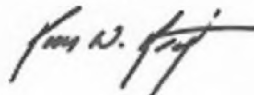
*(3) The identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological Opinion,*

Many of the interim construction actions implemented in the fall of 2020, including the placement of the temporary sheet pile rock wall, are changed from the proposed action and those changes have created effects that were not considered in WCR-2016-4993.

We understand that Electron has begun to approach several state and federal permitting agencies about elements for an updated action, and that the USACE is awaiting an updated description of the proposed action from Electron that could facilitate re-initiation of the proposed action in the 2018 Opinion. However, NOAA-Fisheries has not been sufficiently engaged in any of the conversations at this point and is not aware of any elements that will be included to address the current adult and juvenile passage issues. NOAA-Fisheries is not be able to complete a re-initiated consultation on the actions proposed in WCR-2016-4993 prior to this year's in-water work window. Further, the approach developed and used in WCR-2016-4993 to address Electron's construction through ESA Section 7 (i.e., Phase 1) followed by a later consultation on Electron's operations (i.e., Phase 2) through development of a Habitat Conservation Plan, is currently not a viable response to the present emergency. The only action that NOAA Fisheries will be able to prioritize for ESA consultation this year is an action designed to immediately ensure safe fish passage.

We will follow up with potential meeting times. In the interim, if you would like to discuss this issue sooner, please contact Lisa Abernathy, Biologist (206.707.5386)

Sincerely,



Kim W. Kratz, Ph.D.  
Assistant Regional Administrator  
Oregon Washington Coastal Office

cc: Jenae Churchill  
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